Supreme Court, U.S.
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No. 95-67

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORD LIFE INSURANCE COMPANY,
Petitioner,

v.

JOYCE MILLER,
Administratrix for the ESTATE OF MEARL M. MILLER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent's Brief in Opposition to the Petition for Writ of Certiorari is replete with allegations masquerading as facts. For example, Respondent proffers as a "key fact" upon which the Alabama Supreme Court based its decision: *"Ford Life's agents were told not to relay information they learned about an applicant's health to Ford Life so that Ford Life could (theoretically) deny such claims with impunity."*[1] Tellingly, Respondent makes no reference to the Record to support this spurious allegation. Respondent knows she has not presented a

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[1] Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 2.

scintilla of evidence that would justify such a rash allegation; instead, Respondent adopts "facts" which would present her case in the most favorable light before this Court.[2]

Yet, Respondent cannot be blamed for her misstatement of the facts and issues before this Court—this same tactic, when employed before the Alabama Supreme Court, preserved an otherwise unmeritorious bad faith claim.[3]

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[2] *See* Respondent's Brief, p. 1:

"The Ford Life agent repeatedly assured Mr. Miller . . . that, despite Mr. Miller's emphysema, the Ford Life credit life insurance policy would pay . . . ."

Paula and Harold Goss, who were present during portions of the discussions between Mr. Miller and a Treadwell employee, claim they could not recognize or identify the person who made the alleged misrepresentations to Mr. Miller (C-570-71; 769; 787; 1113-1114)—Respondent has never shown that the Gosses were present during any conversations between Mr. Miller and a Ford Life agent.

Respondent's Brief, p. 2:

"[T]he post-death or 'reverse' underwriting did not reveal any facts which were not revealed by Mr. Miller prior to the issuance of the policy."

At best, Respondent has shown that Miller disclosed to a Treadwell employee that he had emphysema, Paula and Harold Goss admit Miller never disclosed he was receiving social security disability benefits, had retired from Ingalls Shipbuilding for medical reasons, was suffering from disabling asthmatic bronchitis, various other chronic obstructive pulmonary diseases, had a duodenal ulcer, and had spent several weeks in the hospital immediately preceding his signing the good health certificate verifying that to the best of his knowledge he was in good health. (C-131; 188; 191; 222; 271-274; 299-300; 305-308; 584; 1084; 1129)—the testimony of Respondent's own witness impeach her representations that Miller made a full disclosure of his ill health.

[3] In her brief before the Alabama Supreme Court, Respondent habitually referred to *Ford Life Insurance Co. v. Jones*, 262 Ark. 881, 563 S.W. 2d 399 (Ark. 1978), not merely as supporting au-

REASONS FOR GRANTING THE WRIT

I. IRRESPECTIVE OF THE ULTIMATE FATE OF RESPONDENT'S BAD FAITH CLAIM, THE ALABAMA SUPREME COURT DEPRIVED FORD LIFE OF ITS RIGHT TO DUE PROCESS WHEN IT REMANDED FOR TRIAL RESPONDENT'S BAD FAITH CLAIM DESPITE ESTABLISHED COMMON LAW PROHIBITING SOLICITING AGENTS FROM BINDING INSURERS IN CONTRACT AND STATUTORY LAW PROHIBITING PREVARICATORS FROM BINDING INSURERS IN CONTRACT, AS SUCH, FORD LIFE IS ENTITLED TO AN IMMEDIATE APPEAL TO THIS COURT.

Respondent claims the constitutional issues raised by the Petitioner are not ripe for review because Petitioner has suffered no punitive damages as a result of the Alabama Supreme Court's unconstitutional ruling. To support her argument, Respondent cites *Hutto v. Bic Corp.*, 880 F. Supp. 1367 (E.D. Va. 1992) and *Transflock, Inc. v. United States*, 765 F. Supp. 750 (C.I.T. 1991).

In so doing, Respondent mischaracterizes both the issues before this Court and the rulings in the cases she cites. First, Respondent fails to acknowledge or address that the Alabama Supreme Court, in reversing Summary Judgment on Respondent's breach of contract and bad faith claims, implicitly overruled over one hundred years of *stare decisis* which had prohibited soliciting agents from binding insurers in contract. Second, Respondent fails to acknowledge or address that the Alabama Su-

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thority, but as evidence of wrongdoing in the case *sub judice*. Respondent, in her brief before this Court, has not strayed from this routine. *See* Respondent's Brief, pp. 12-13.

Respondent, perhaps mindful of the frailties of her legal and factual argument, attempts further to confuse this Court by commenting that Ford Life has, in the past, settled lawsuits filed against it. This, Respondent is "evidence" of Ford Life's misconduct in this case, however, Respondent is bound by the facts of her own case.

preme Court, in refusing to enforce § 27-14-7 *Code of Alabama (1975)*, relied upon an exception limited to instances wherein the applicant in no way participated in, or was made aware of, the fraud perpetrated upon the insurer.

That the Alabama Supreme Court departed from established common law regarding the authority of soliciting agents to bind their insurers is inescapable. In two factually identical cases, the Alabama Supreme Court reached directly opposite conclusions:

> *"No conclusion can be indulged that the agent, under such circumstances had, or could have acted on, any real or supposed authority for waiving any conditions specified as grounds of forfeiture. . . . [To do otherwise] would be against the plainest dictates of reason and justice."*

Powell v. Prudential Ins. Co. of America, 45 So. 208 (1907).

> *"We disagree with the trial court's conclusion that the Ford Life representative, a soliciting agent, could not legally bind the company."*

Miller v. Dobbs Mobile Bay, —— So. 2d ——, No. 1921552 (Ala. Feb. 24, 1995) (Appendix A of Petitioner's Brief, p. 7(a)) (emphasis added).

Likewise, the Court's ruling materially departed from Alabama statutory law:

"(a). . . . misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have

> *issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise."*

Excerpts of § 27-14-7 Code of Alabama (1975)

Yet, the Alabama Supreme Court still held:

"The jury could find that the only misrepresentation made by Mr. Miller came when he signed a good health certificate."

Miller v. Dobbs Mobile Bay, —— So. 2d ——, No. 1921552 (Ala. Feb. 24, 1995) (Appendix A of Petitioner's Brief, p. 7(a)) (emphasis added).

As thoroughly discussed in Petitioner's preceding Brief before this Court, the cases upon which the Alabama Supreme Court relied in refusing to enforce § 27-14-7 *Code of Alabama (1975)* are, by the Court's own admission, distinguishable from the case *sub judice.*

At the caprice of the Alabama Supreme Court, Ford Life, although it neither violated the law, nor committed an actionable tort at the time it denied Respondent's claim, now finds itself exposed to a jury trial on Respondent's bad faith claim. It is this retroactive liability upon a claim requesting assessment of *quasi*-criminal penalties that deprives Ford Life of its right to due process—irrespective of the ultimate jury verdict.

Respondent has reviewed Petitioner's survey of Alabama's punitive damages (which documents the inequity of Alabama's punitive damage system) and has concluded that Petitioner's due process issue is premised upon Petitioner's objection to an **unspecified amount** of an **unrendered verdict.** Respondent's conclusion is wrong. Peti-

tioner was denied its right to due process when the Alabama Supreme Court ignored over a century of Alabama common law regarding the limited authority of soliciting agents and then refused to enforce § 27-14-7 *Code of Alabama (1975)*. Petitioner's survey regarding the excessive verdicts and procedural abuses suffered by out-of-state defendants in Alabama courts merely indicates the **degree** to which those rights were violated.

Despite Respondent's representations, neither of the cases cited by her are responsive to the due process issues before this Court. Respondent's first case, *Hutto v. Bic Corp.*, 800 F. Supp. 1367 (E.D. Va. 1992), does not address the constitutional quagmire of retroactively rendering conduct susceptible to *quasi*-criminal damages. In *Hutto,* the court neither refused to recognize the defendant's affirmative defenses nor created a new basis for punitive damages after commencement of the suit, and, as such, is distinguishable from the case at hand.

At least *Hutto* discussed the issue of punitive damages; Respondent's second case, *Transflock, Inc. v. United States,* 765 F. Supp. 750 (C.I.T. 1991) never discusses punitive damages and is wholly inapplicable to the topic for which it was cited.

This Court has ruled on a number of occasions that when a party shows it has been deprived of a fundamental constitutional right, appeal to this Court is warranted even if an entire trial remains pending. *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). In *Mills,* the trial Court granted that defendant's demurrer to a criminal complaint on federal constitutional grounds. The Alabama Supreme Court reversed and remanded the case for jury trial. **This Court took jurisdiction because the defendant made a showing that the Alabama Supreme Court had deprived him of his constitutionally mandated defense.** In refusing to withhold ruling on that issue until after defendant had undergone a jury trial, this Court held that to dismiss the defendant's

appeal "*would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets*". *Mills v. Alabama*, at 217-218, 86 S.Ct. at 1436 (footnote omitted).[4]

Petitioner's due process issue is ripe for hearing by this Court. Although Ford Life may prevail on Respondent's breach of contract and bad faith claims at trial, absent this Court's intervention, there would remain, unreviewed by this Court, the Alabama Supreme Court's ruling that at its whimsy the laws of Alabama may be modified and applied retroactively—even if retroactive application of the Court's departure from established law exposes a defendant to punitive damages. Refusing to grant Petitioner's request for Writ of Certiorari would leave the question as to whether the Alabama Supreme Court has such authority to arbitrarily change the law in an uneasy and unsettled constitutional posture that can only further harm the operation of business in Alabama. The Alabama Supreme Court's self-proclaimed independence from *stare decisis* and statutory law cannot help but have a chilling effect upon all business in Alabama because these businesses and their counsel are now left guessing as to what the Alabama Supreme Court will recognize as binding authority.

Finally, when a Petitioner shows that this Court's refusal to extend a Writ of Certiorari would leave unanswered important constitutional issues, and, at the same

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[4] *See also Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n., 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971); *Construction Laborers v. Curry*, 371 U.S. 542, 550-551, 83 S.Ct. 531, 536-537, 9 L.Ed.2d 514 (1963); *Pope v. Atlantic C. L. R. Co.*, 345 U.S. 379, 382, 73 S.Ct. 749, 750, 97 L.Ed. 1094 (1953); *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 73-74, 67 S.Ct. 156, 158-159, 91 L.Ed. 80 (1946).

time, shows this Court's ruling thereon could be dispositive of the Petitioner's case, this Court has customarily granted Certiorari.[5] This is such a case—a finding by this Court that the Alabama Supreme Court cannot arbitrarily depart from *stare decisis*, ignore statutory law, and make its decision retroactive, would be dispositive of Respondent's Complaint.

CONCLUSION

The issues brought before this Court in Petitioner's Request for Writ of Certiorari are ripe for this Court's review and denial of Petitioner's request for Writ of Certiorari would have a chilling effect on all commerce in Alabama because such a ruling would leave unaddressed the Alabama Supreme Court's capricious decision to retroactively modify Alabama law so as to expose a defendant to punitive/*quasi*-criminal damages. If this Court were to refuse Petitioner's Request for Certiorari, Alabama businesses and their counsel would be left wondering whether the Alabama Supreme Court will deem any existing common law or statutory law as binding upon it.

Respectfully submitted,

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[5] *See Gilliespi v. U.S. Steele Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964); *Radio Station WOW, Inc. v. Johnson*, 326 U.S., at 124, 65 S.Ct. at 1478.